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IN THE

SUPREME COURT OF THE UNITED STATES

SPRING TERM, 1976

No. 75-6197

CHARLES MARTIN NEAL — PETITIONER

v.

STATE OF ARKANSAS — RESPONDENT

PETITION FOR WRIT OF
CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

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IN THE

SUPREME COURT OF THE UNITED STATES

SPRING TERM, 1976

No. 76-___

CHARLES MARTIN NEAL — PETITIONER

v.

STATE OF ARKANSAS — RESPONDENT

PETITION FOR WRIT OF
CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Arkansas entered on December 22, 1975, rehearing denied, January 26, 1976.

CITATION TO STATE COURT OPINION

The opinion of the Supreme Court of Arkansas is reported at 259 Ark. 27, 531 S.W. 2d 17, (1975) and is set out in Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3), Petitioner having asserted below and is asserting here deprivation of rights secured by the Constitution of the United States of America.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I.

This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

II.

This case also involves the following provisions of the Arkansas Code Annotated:

41-4701. Categories of felonies—Felonies are classified for the purpose of sentence, and for any other purpose specifically provided by law, into the following categories:

(a) capital felony;
(b) life felony without parole;
(c) life felony; and
(d) felony. [Acts 1973, No. 438, §1, p. ___.]

41-4702. Capital felonies—Definitions.—The following crimes shall be capital felonies punishable as provided in Section 6 [§41-4706] hereof:

(A) the unlawful killing of a human being when committed by a person engaged in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, kidnapping, or mass transit piracy;

(B) any person convicted of treason as now defined by law;

(C) the unlawful killing of a policeman or any other law enforcement officer, jailer, prison guard or any other prison official, fireman, a judge or any other court official, probation officer, parole officer, military personnel, when any such person so killed is acting in the line of duty, and when such killing is perpetrated from a premeditated design to effect the death of the person killed or of any other human being;

(D) the unlawful killing of two (2) or more human beings when perpetrated from a premeditated design in the course of the same act to effect the death of the persons killed or any other human being;

(E) the unlawful killing of any public official or any candidate for public office from a premeditated design to effect the death of the person killed or of any other human being; and

(F) the unlawful killing of any person by a person who is already under sentence of death or of life in the penitentiary.

As used in subsection (A) of this section, the term "mass transit piracy" shall mean the seizing or exercising of control by force or threat of violence, without lawful authority and with wrongful intent, of any vehicle with a seating capacity of more than eight (8) passengers operated by a common or contract carrier of passengers for hire, containing a non-consenting person or persons within this State.

As used in this Act [§§ 41-4701—41-4716], the term "public official" as used in subsection (E) of this section, shall mean any person holding a public office which, under the constitution or laws of this State, is filled by election. [Acts 1973, No. 438, §2, p.___.]

41-703. Life felony without parole.—When any person shall be convicted of any capital felony listed in Section 2 [§41-4702] hereof, and the jury in its discretion finds mitigating circumstances as set forth in Section 12 [§41-4712] and determines that these mitigating circumstances preclude the imposition of death by electrocution, then such crime shall be a life felony without parole and shall be punishable as provided in Section 7 [§41-4707] hereof. [Acts 1973, No. 438, §3, p. ___].

41-4704. Life felonies.—All other offenses for which life imprisonment or death in the electric chair is presently prescribed by Arkansas law shall be felonies and shall be punishable as provided in Section 8 [§41-4708] hereof. [Acts 1973, No. 438, §4, p.___.]

41-4705. Felonies.—Any other crime now or hereafter punishable by imprisonment for a term of years in the Arkansas State Penitentiary shall be a felony. [Acts 1973, No. 438, §5, p.___.]

41-4706. Conviction of capital felonies—Punishment.—A person convicted of a capital felony shall be punished by death by electrocution or by life imprisonment without parole as provided in Section 10 [§41-4710] hereof. [Acts 1973, No. 438, §6, p. ___.]

41-4707. Conviction of life felony without parole—Punishment.—A person convicted of a life felony without parole shall be imprisoned in the Arkansas State Penitentiary for the remainder of his life and shall not be released except pursuant to a commutation, pardon, or reprieve of the Governor, conducted and granted in accordance with Section 14 [§41-4714] hereof. [Acts 1973, No. 438, §7, p.___.]

41-7408. Conviction of life felony—Punishment.—A person convicted of a life felony shall be imprisoned in the State Penitentiary for the remainder of his life and shall not be released except pursuant to a commutation, pardon, or reprieve of the Governor or pursuant to parole procedures now or hereafter established by law. [Acts 1973, No. 438, §8, p.___.]

41-4709. Conviction of felony—Punishment.—A person convicted of a felony shall be punished by a fine and/or imprisonment in the Arkansas State Penitentiary as may now or hereafter be provided by law. [Acts 1973, No. 438, §9, p.___.]

41-4710. Trial procedure—Verdict in writing.—A person charged with a capital felony shall be given a jury trial and sentenced pursuant to the following procedure:

(a) After presentation of all evidence and witnesses to be offered by the State and/or the defendant as to the guilt or innocense of the defendant, instructions to the jury, and argument by counsel, the jury shall retire and consider the case.

(b) If the jury finds the defendant guilty of a capital felony, the same jury shall sit again to determine whether the defendant shall be sentenced to death or life imprisonment without parole.

(c) In the proceeding to determine sentence, evidence may be presented as to any matters relevant to sentence and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in Sections 11 [§41-4711] and 12 [§41-4712 of this act. The State and the defendant or his counsel shall be permitted to present argument for or against the sentence of death.

(d) After hearing all the evidence as to sentence, the jury shall again retire and render a sentence based upon the following:

(i) whether beyond a reasonable doubt sufficient aggravating circumstances, as enumerated in Section 11 [§41-4711] of this act, exist to justify a sentence of death;

(ii) whether sufficient mitigating circumstances as enumerated in Section 12 [§41-4712] of this act exist to justify a sentence of life imprisonment without parole.

(e) The jury in rendering its verdict shall set forth in writing its findings as to each of the aggravating or mitigating circumstances enumerated in Sections 11 [§41-4711] and 12 [§41-4712] hereof and shall set forth in writing its conclusion:

(i) that sufficient aggravating circumstances (do or do not) exist beyond a reasonable doubt to justify a sentence of death;

(ii) that there are (or are not) sufficient mitigating circumstances to outweigh the aggravating circumstances.

(f) If the jury does not make the findings requiring the death sentence by unanimous verdict, the court shall impose sentence of life imprisonment without parole. [Acts 1973, No. 438, §10, p. ___.]

41-4711. Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(a) the capital felony was committed by a person under sentence of imprisonment;

(b) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;

(c) the defendant in the commission of the capital felony knowingly created a great risk of death to one (1) or more persons in addition to the victim;

(d) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(e) the capital felony was committed for pecuniary gain; and

(f) the capital felony was committed for the purpose of disrupting or hindering the lawful exercise of any governmental function, political function or the enforcement of laws. [Acts 1973, No. 438, §11, p. ___.]

41-4712. Mitigating circumstances.—Mitigating circumstances shall be the following:

(a) the capital felony was committed while the defendant was under extreme mental or emotional disturbance;

(b) the capital felony was committed while the defendant was acting under unusual pressures or influences, or under the domination of another person;

(c) the capital felony was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication or drug abuse;

(d) the youth of the defendant at the time of the commission of the capital felony; or

(e) the capital felony was committed by another person and the defendant was an accomplice or his participation relatively minor. [Acts 1973, No. 438, §12, p. ___.]

41-4713. Review.—Nothing herein shall be construed to limit the powers of the Supreme Court to review and reverse the finding of guilt for errors of law, prejudice, insufficient evidence, or any other reason now permitted on review of convictions and sentences to life imprisonment. [Acts 1973, No. 438, §13, p. ___.]

41-4714. Commutations—Pardons—Reprieves—Rules and regulations—Application.—Commutations, pardons, or reprieves by the Governor of any sentence of a person convicted of a capital felony or of a life felony without parole shall be granted, pursuant to Article 6, Section 18 of the Constitution of Arkansas, under the following rules and regulations:

(a) A copy of the application for pardon, reprieve, or commutation (hereinafter referred to as the application) of such sentence and/or convicted person shall be filed with the Secretary of State, the Attorney General, and the Prosecuting Attorney, Sheriff and Circuit Judge for the County in which the offense of the applicant was committed.

(b) The application setting forth the grounds upon which the pardon, reprieve, or commutation is asked shall be published for two (2) insertions in a newspaper of general circulation in the county in which the offense of the applicant was committed.

(c) On granting the application, the Governor shall include in his order a list of his reasons for granting the application and shall file a copy of his order and his reasons therefor with each house of the General Assembly, stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon, or reprieve. [Acts 1973, No. 438, §14, p. ___.]

41-4715. Parole-Persons ineligible.—A person sentenced for a capital felony to life without parole or for a life felony without parole shall not be eligible for parole and shall not be paroled. [Acts 1973, No. 438, §15, p. ___.]

41-4716. Parole—Sentence commuted to term of years—Effect.—If a person sentenced to life without parole or for a life felony without parole has his sentence commuted by the Governor to a term of years, such person shall not be paroled, nor shall the length of his incarceration be reduced in any way to less than the full term of years specified in the order or commutation or in any subsequent orders of commutation. [Acts 1973, No. 438, §16, p. ___.]

ISSUES PRESENTED

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE ARKANSAS CAPITAL FELONY MURDER STATUTE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

II.

THE COURT ERRED IN EXCLUDING FROM THE JURY PANEL VENIREMEN WHO EXPRESSED GENERAL OBJECTIONS TO THE DEATH PENALTY.

III.

THE INSTRUCTION ON MENTAL RESPONSIBILITY VIOLATED DUE PROCESS BY PLACING THE BURDEN OF PERSUASION ON THE DEFENDANT.

IV.

THE STATE OF ARKANSAS HAS FAILED TO SHOW WHAT COMPELLING STATE INTEREST WILL BE SERVED BY IMPOSING THE DEATH PENALTY IN THIS ROBBERY-MURDER CASE. THEY HAVE ALSO FAILED TO SHOW THAT SUCH PENALTY IS THE LEAST RESTRICTIVE MEANS OF FURTHERING THE STATE'S PERMISSIBLE OBJECTIVES.

STATEMENT OF CASE

Petitioner, a 20-year old young man, was charged with Capital Felony Murder in violation of Ark. Stats. Ann. 47-4701 et. seq. by information filed January 30, 1975. On February 3, 1975, Petitioner and his rap partner pled guilty after the State agreed to waive the death penalty. (T. 48) On April 7, 1975, Petitioner withdrew his plea and a trial date was set. (T. 66) On May 20, 1975, after a trial by jury, the Petitioner was found guilty and sentenced to death by electrocution.

ARGUMENT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE ARKANSAS CAPITAL FELONY MURDER STATUTE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The Petitioner was convicted of capital felony murder pursuant to Ark. Stats. Ann. §41-4701 et. seq. (Supl. 1973). The Petitioner was sentenced to death in the electric chair. Ark. Stats. Ann. §41-4701 et. seq. is the codified version of Act 438 of 1973, passed by the Arkansas Legislature to reinstate capital punishment after the U. S. Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972) declared the existing discretionary death penalty statutes unconstitutional.

The issue here is whether Act 438 actually meets the requirements set out in Furman or whether the Act is merely a vehicle to get around the constitutional mandate set out by this Court. The Court in Furman was concerned with the arbitrary application of the death penalty as it is applied to economic and social minorities.

To determine whether the new Act allows for too much discretion, Petitioner wishes this Court start at the initial step in the criminal process in Arkansas, the information. Arkansas allows the Prosecuting Attorney to file felony charges by issuing an information. (See Ark. Stats. Anno. 43-409). Indictment by a grand jury is not required.

Act 438 has no effect on the duty of the Prosecuting Attorney. The duty of the Prosecuting Attorney is set out in Ark. Stats. Ann. 24-101 and reads as follows:

> 24-101. Residence—Duty to prosecute actions.—Each attorney [prosecuting attorney] shall reside in the judicial circuit for which he may be elected, under the provisions of the Constitution of this state, and shall commence and prosecute actions, both civil and criminal, in which the state or any county in his circuit may be concerned. [Rev. Stat., ch. 16, §1; C. & M. Dig., §8312; Pope;s Dig., §10889.]

Who is charged, with what crime, is left totally to the discretion of the Prosecuting Attorney. The statute simply requires the Prosecuting Attorney to "commence and prosecute actions, both civil and criminal." The Prosecutor here at his discretion could have charged Petitioner with anything from capital felony murder, a felony, to assault with a deadly weapon, a misdemeanor.

Prosecutorial Discretion does not end after the charges have been filed. After the information has been filed and before a trial has been held, the prosecutor is allowed to plea bargain with the defendant. The Prosecuting Attorney can offer a lesser sentence for a plea of guilty, or he or she can offer to reduce the charge if the defendant agrees to plead guilty. An excellent example of the former presents itself in this case. As was previously mentioned, Petitioner initially pled guilty and in return for this plea, the State offered to waive the death penalty. The transcript, on pages 47 and 48 has the following:

> THE COURT:
> Does the State agree to waive the death penalty in this case on a plea of guilty?
>
> MR. TANNER (Deputy Prosecuting Attorney)
> Your Honor, this is a negotiated plea and, if the defendants choose to plead guilty, we have agreed to waive the death penalty or make a motion to waive the death penalty to the Court.

Sometime subsequent to this plea, the Petitioner withdrew his plea of guilty and entered a plea of not guilty. The State then asked for the death penalty at the trial. Petitioner's rap partner was sentenced to life without parole based on the plea bargain.

This case points out a rather obvious and blatant example of the extent to which an arbitrary prosecutorial decision may mean the difference between life and death.

The arbitrariness does not stop with the Prosecuting Attorney. At the trial level, we should shift our focus on the jury, the citizens who will be called upon to make the final decision. The question to be asked is, "Did the Arkansas Legislature enact a law that would allow the jury to hear the case and make a decision and do so without allowing for arbitrary considerations?". Petitioner answers this question in the negative.

Ark. Stats. Ann. §41-4702 (Supp. 1973), defines the crimes which shall be capital felonies; subsection (A) covers "the unlawful killing of a human being when committed by a person engaged in the perpetration of...robbery...." The Petitioner was charged by information, as the jury was instructed to have committed the offense of capital felony murder on May 20, 1975, while in the perpetration of a robbery. The jury, by unanimous verdict, found the Appellant guilty of capital felony murder as charged in the Information.

With the rendering of the verdict, the jury completed the first phase of the bifurcated trial procedure as set out in Ark. Stats. Ann. §41-4710 (Supp. 1973). The jury then had to determine whether the Appellant would be sentenced to death or life imprisonment without parole, the penalties provided for a capital felony conviction, Ark. Stats. Ann. §41-4706 (Supp. 1973). By written verdict the jury sentenced the Appellant to death by electrocution.

The Arkansas Supreme Court has upheld the validity of Act 438 in the cases of Collins v. State, 259 Ark. 8, 531 S.W.2d 13 (1975), and Neal v. State, 259 Ark. 27, 531 S.W. 2d 17 (1975), which were decided on the same day. The Appellant contends that Act 438 of 1973 and the sentence of death by electrocution imposed upon thereby is unconstitutional and violative of Furman v. Georgia, supra, notwithstanding Collins and Neal.

Ark. Stats. Ann. §41-4710(c) (Supp. 1973), which describes the sentencing procedure, requires consideration by the jury of enumerated mitigating and aggravating circumstances plus, "any matters relevant to sentence". The procedure for weighing the statutory circumstances is set out in Ark. Stats. Ann. §41-4710(d) and (e)(Supp. 1973), but there are no standards provided for the jury's interjection of any other relevant matters as to sentence into such a procedure.

Concerning first the permissible inclusion of relevant matters, the above section of Act 438 opens the door for matters to influence the jury to the extent that sentences imposed under Act 438 would soon return to pre-Furman days. This Court in Furman was not only concerned with the arbitrariness of the sentences in the cases before the Court in 1972, but also future, potential sentences pregnant with impermissible considerations vaguely defined as "matters relevant to the sentence".

The potential for improper inclusion of material in the sentencing procedure discussed above is further compounded by Act 438's lack of provision for direct and immediate appellate review. The Arkansas Supreme Court cited in Collins v. State, 259 Ark. 8, at 13 (1975) the cases of State v. Dixon, Coley v. State and Jurek v.State (citations infra) in support of requiring written findings from the jury so that the basis for a verdict will be known and can be compared with the punishment imposed in other cases.

The cases cited in Collins however, rested their approval of the challenged statutes on the opportunity for meaningful comparative appellate review. Coley v. State, 231 Ga. 829, 204 S.E. 2d 612, at 613-614, 616 (1974), describes the Georgia procedure which provides for appellate review as soon as the trial transcript is prepared in order to consider the punishment, as well as any errors enumerated by appeal. The Georgia procedure specifically requires the appellate court to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Any arbitrariness or discrimination which might have occurred in the sentencing procedure would be disclosed by the Georgia comparative sentencing review.

In State v. Dixon, 283 S. 2d 1, at 10 (Fla. 1973), the Florida Supreme Court concluded that its review guarantees that the reasons present in one case will lead to a similar result in another case with similar circumstances. Florida statutory procedure provides for the weighing of mitigating and aggravating circumstances as does Act 438, but it also requires automatic review within 60 days. Death penalty cases have priority over all other cases, and the Florida Supreme Court reviews each case in light of the other decisions to determine whether or not the punishment is too great.

Texas law also requires automatic review of a conviction and sentence of death within 60 days, with death penalty cases having priority over all other cases, U.T.C.A. Penal Code Art. 37.071(f). Jurek v. State, 522 S.W. 2d 934, 939 (Tex. Crim. App. 1975) upheld the Texas death penalty statute holding the discretion of the jury as to punishment had been effectively channelled to insure against arbitrary and wanton imposition of the death penalty. Two of the reasons the Court gave, concerned the statute's sentencing procedures, but the third was that the statute provided for swift and mandatory review.

Ark. Stats. Ann. §41-4713 (Supp. 1973) provides for appellate review of sentences rendered pursuant to 41-4710. This review provision does not offer the condemned defendant any special appeal procedure and does not require mandatory review of death sentences. It also inexplicably omits specific mention of review of death sentences. It does not provide special appeal procedures for ensuring swift and mandatory review of any conviction under the chapter.

Petitioner submits that lack of mandatory review in Act 438, necessary to effectuate "comparative sentencing" and thus eliminate arbitrary sentences of death and achieve similar results in cases with similar circumstances, is violative of Furman, supra. This lack of mandatory review, coupled with Act 438's invitation to the jury to consider "relevant" matters during the sentencing proceeding without defining or limiting such matters, invites arbitrary sentences.

Further, even the enumerated factors to be weighed by the jury during the sentencing proceeding lack the precision required by Furman, supra, to prevent the arbitrary imposition of capital punishment. See note, Discretion and the Constitutionality of the New Death Penalty Statutes, 87 Harv. L. Rev. 1690, 1708 (1974).

The Petitioner has taken due note of the Arkansas Supreme Court's evaluation of the enumerated aggravating and mitigating circumstances to be used in the sentencing phase of the bifurcated capital felony trial in Neal v. State, 259 Ark. 27, 32-33 (1975). Mr. Justice Holt in Neal supra, held the statute's "terminology" to be a matter of such common understanding and practice that an ordinary man or juror would not have to speculate as to its meaning. But their lack of preciseness leads to unlike results in cases presenting similar circumstances.

The lack of preciseness in the enumerated circumstances to be considered by the jury does not lend itself to the elimination of arbitrarily imposed death sentences. This lack of preciseness, even if it may lead to reasonable sentence choices, requires appellate review of comparative sentencing as required in the statutes reviewed by Coley, Jurek, and Dixon, supra, and relied upon by this Court to validate Act 438 in Collins v. State, 259 Ark. 8, 13 (1975).

For the above-stated reasons, Petitioner submits that Act 438 of 1973 does not meet the required standards of Furman v. Georgia, supra, and is, therefore, unconstitutional. The Appellant's conviction should be reversed and remanded for re-sentencing.

II.

THE COURT ERRED IN EXCLUDING FROM THE JURY PANEL VENIREMEN WHO EXPRESSED GENERAL OBJECTIONS TO THE DEATH PENALTY.

In Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), the United States Supreme Court reversed appellant's conviction for murder and sentence of death because the exclusion of certain veniremen created a jury which was biased in favor of conviction. The court specifically held that:

> ...a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty on expressed conscientious or religious scruples against its infliction. (391 U.S. 522-33, 88 S. Ct. 1776-77, and 20 L. Ed. 2d 784-85).

The above quoted portion of the opinion is accompanied by a footnote which amplifies and explains the holding. That footnote, number 21, will be set out in full.

> Just as veniremen cannot be excluded for cause on the ground that they hold such views, so too they cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion. See Ann. 5 and 9, supra.
>
> We repeat, however, that nothing we say today bears upon the power of a state to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. Nor does the decision in this case affect the validity of any sentence other than one of death. Nor, finally, does today's holding render invalid the conviction, as opposed [sic] to the sentence, in this or any other case. (emphasis in the original) (391 U.S. 522, 88 S. Ct. 1777, 20 L. Ed. 2d 785).

A portion of the text of footnote 9 to the opinion is essential to an understanding of the case.

> The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood—or misunderstood—by prospective jurors. Any "layman ...[might] say he has scruples if he is somewhat unhappy about death sentences...[Thus] a general question as to the presence of ...reservations [or scruples] is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direst cases." [citing a comment in 1968 Duke L.J. 283 et. seq.] "...Unless a veniremen states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position. (391 U.S. 515, 188 S. Ct. 1774, 20 L. Ed. 2d 781-782).

When we apply the rule set out in Witherspoon to the voir dire in Petitioner's case, we can come to no other conclusion but that the trial judge did not properly voir dire the jury, and he committed error by striking these jurors for cause. The voir dire consisted of the Judge making a general statement, "I will ask you if for any reason, personal reason or otherwise, that some of you will be unable to consider the death penalty in this case? Would you stand, please. Your name, please." After the jurors stood and identified themselves, the Court went on to say, "All right, each of you, I take it, are stating that regardless of the facts that you would be unable to consider the death penalty in the case?" The Judge then excused these jurors, and the defense counsel objected to the exclusion. This voir dire cannot possibly meet the requirements set out above. The Court at this point should have proceeded to interrogate each juror separately to remove any ambiguity or misunderstanding that they may have had regarding the death penalty. It was this failure to make further inquiry that made the exclusion of these jurors' error on the part of the trial court.

III.

THE INSTRUCTION ON MENTAL RESPONSIBILITY VIOLATED DUE PROCESS BY PLACING THE BURDEN OF PERSUASION ON THE DEFENDANT.

The defense introduced testimony establishing that the Defendant was quite retarded (supra). The trial court's instruction on mental capacity was as follows:

THE STATE'S REQUESTED INSTRUCTION NO. 15 (AS AMENDED BY THE COURT)

> In this case, the Defendant has entered a plea of not guilty by reason of insanity. With respect to the insanity issue, you are instructed that the law presumes that every man is sane and that he intends the natural and probable consequences of his act. Therefore, when a plea of insanity is interposed as a defense, the burden is on the defendant to establish his insanity by a preponderance of the evidence. Preponderance of evidence means the greater weight of evidence. It is the evidence which when weighed with that opposite to it is more convincing and is more probably true and accurate.
>
> You are further instructed that the defense of insanity cannot avail in this case unless it appears from a preponderance of the evidence, first, that at the time of the offense the Defendant was under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or, second, if he did know it, that he did not know that he was doing what was wrong; or, third, if he knew the nature and quality of the act, and knew that it was wrong, that he was under such duress of mental disease as to be incapable of choosing between right and wrong as to the act done, and unable, because of the disease, to resist the doing of the wrong act which was the result solely of the mental disease. Bell v. State, 120 Ark. 530, 180 S.W. 186 (1915).

This placement of the burden of proof for mental responsibility is consistent with prior pronouncements of the Arkansas Supreme Court on the insanity defense. See Stewart v. State, 233 Ark. 458, 461, 345 S.W. 2d 472 (1961); Bell v. State, 120 Ark. 530, 180 S.W. 186 (1915). In Hill v. Lockhart, 516 F. 2d 910 (8 Cir. 1975), the Eighth Circuit Court of Appeals found the Arkansas rule constitutional.

In 1952 the United States Supreme Court upheld an Oregon provision requiring the Defendant to prove insanity beyond a reasonable doubt in Leland v. Oregon, 343 U.S. 790 (1952). However, these decisions are inconsistent with present due process analysis and, in particular, with Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1975), and can no longer be followed.[1] The burden of persuasion for all issues relevant

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[1]We would direct the Court's attention to Osenbaugh. The Constitutionality of Affirmative Defenses to Crimes. Ark. L. Rev., Vol. 29, No. 4, to be published in April, 1976.

to guilt should be borne by the State. In the alternative, it will be argued that lack of mental capacity is a "critical fact in dispute" for which the Defendant cannot be forced to bear the risk of non-persuasion.

In In re Winship, 397 U.S. 358, 364 (1970), the United States Supreme Court stated:

> Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

In Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881 (1975), the United States Supreme Court held Maine's requirement that the defendant prove sufficient provocation to reduce murder to manslaughter violated due process. Even though Maine characterized this fact issue as a mere punishment factor and not an element, the Court found it an unconstitutional shift in the burden of proof. The Court analyzed the extent of risk of error and determined that provocation was a "critical fact in dispute." The Court rejected Maine's arguments that the fact that the issue was peculiarly within defendant's knowledge or the hardship to the State in disproving a negative justified the shift in the burden of persuasion.

In Mode v. State, 231 Ark. 477, 485, 330 S.W. 2d 88, 92 (1959), the Arkansas Supreme Court, in holding the defendant, could not be required to bear the burden of persuasion for self-defense, stated:

> "It would," says Mr. Bishop, "be a wide departure from the humanity of the criminal law to compel a jury, by a technical rule, to convict one of whose guilt, upon the whole evidence, they had a reasonable doubt. And it would reverse the presumption of innocence to hold a defendant guilty unless, taking the burden on himself, he could affirmatively prove himself innocent. All evidence should be viewed in its entirety, not in detached parts. The whole of an alleged crime must be proved, just as the whole of it must have been committed.
>
> In reason, therefore, this whole and indivisible thing, the burden of proof, must be borne by the government throughout the trial," 1 Bish. Cri. Pro., sec. 1051.

And as McCormick on Evidence, 802 (2d ed. 1972), has pointed out:

> As to all these claims for exoneration, their truth goes in final analysis to the guilt, to the rightness of punishing, the accused. Thus it seems inconsistent to demand as to some elements of guilt, such as an act of killing, that the jury be convinced beyond a reasonable doubt, and as to others, such as duress or capacity to know right from wrong, the jury may convict though they have such doubt.

Functionally all substantive issues, whether labeled defenses or not, operate identically in establishing defendant's criminal liability. Fletcher, Two Kinds of Legal Rules: A Comparative Study of Burden of Persuasion Practices in Criminal Cases, 77 Yale L. J. 880, (1968).

The State must bear the ultimate burden of persuasion on mental capacity since this is a "critical fact in dispute" under Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881 (1975). In Mullaney, this Court refused to determine the question of burden of proof by resort to the State's characterization of the issue of provocation as an element or a defense. Instead the Court analyzed the likelihood of an erroneous deprivation of liberty if the defendant were required to bear the burden of persuasion and thus the risk of error. Neither Mullaney nor Winship have directly overruled Leland v. Oregon. Mr. Justice Rehnquist, in his concurring opinion in Mullaney distinguishes that case from Leland. In Grace v. Hopper, 234 Ga. 669, 217 S.E. 2d 267 (1975), the Georgia Supreme Court held Mullaney did not overrule Leland. That Court argued the insanity defense did not involve a risk of punishing the innocent since the defense only excused persons who had committed the crime charged. See also Rivera v. State, 351 A. 2d 561 (Del. 1976).

However, we would urge the Court to hold that the Defendant cannot be required to bear the ultimate burden of persuasion on mental capacity. The Georgia court's interpretation of Mullaney is an attempt to continue the characterization approach which was rejected in Mullaney. Instead, the Court must examine the actual effect of the burden of proof provision and its effect on the risk of error at trial. The issue of capacity is so intertwined with mens rea as to constitute an element or a "fact critical to criminal culpability." See La Fave and Scott, Criminal Law §8, 48 (1972). Mullaney arguably requires the State to prove all issues of intent, such as provocation, even if the issue

does not constitute an actual element of the crime. As the Iowa Supreme Court stated in State v. Monroe, 236 N.W. 2d 24, 37 (Iowa 1975):

> It is our reading of Mullaney that an issue such as defendant's mens rea is an element of the offense and cannot be converted to an issue affecting only mitigation of offense.

Justice Ingram of the Georgia Supreme Court dissenting in Grace v. Hopper, supra, argued that the State must bear the burden of proving any intent issue just as it must prove the act charged occurred.

Resolution of the issue of mental capacity is critical in that conviction or acquittal flows directly from it. The Appellant's interest at stake is even greater than that in Mullaney where only the extent of punishment was involved. The danger of error in jury verdicts would appear to be great, given the subjective nature of the issue. In addition, the defense of insanity is such a fundamental limitation on criminal culpability that it should be constitutionally required. State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910); Sinclair v. State, 151 Miss. 142, 132 So. 581 (1931); Monahan, Abolish the Insanity Defense?— Not Yet, 26 Rutgers, L. Rev. 719, 727 (1973).

The justifications for shifting the burden of persuasion of mental capacity are the presumption of sanity and the defendant's unique advantage in ascertaining his true mental condition. See Commentary, §41-601 Ark. Stats. Ann. (1976). However, the presumption, which is based on the fact that most persons are sane, would not seem relevant after a defendant has produced evidence of his particular mental disease. Note, Criminal Law— The Burden Is on the State to Prove Insanity Beyond a Reasonable Doubt, 24 Drake L. Rev. 246 (1974). The value of the presumption of sanity can be maintained by requiring the defendant to produce evidence of insanity before the issue will be considered; this procedure is followed in jurisdictions which require the State to bear the burden of persuasion. See Ann. 17 A.L.R. 3d 146 (1968). Also, Mullaney explicitly stated that the circumstance that the facts concerning the issue are peculiarly within the defendant's knowledge does not justify a shift in the burden of proof. Nor will the hardship to the State in disproving a negative serve as such justification.

Given the purpose of the reasonable doubt requirements to avoid erroneous convictions—the most important determinant of the due process issue is the gravity of the risk of error. Significant differences in the amount and kind of infringement on liberty as well as life in this case depend upon resolution of the issue of mental capacity or insanity. Mullaney therefore requires the State to bear the ultimate burden of persuasion. Placing the burden on defendant was reversible error.

IV.

THE STATE OF ARKANSAS HAS FAILED TO SHOW WHAT COMPELLING STATE INTEREST WILL BE SERVED BY IMPOSING THE DEATH PENALTY IN THIS ROBBERY-MURDER CASE. THEY HAVE ALSO FAILED TO SHOW THAT SUCH PENALTY IS THE LEAST RESTRICTIVE MEANS OF FURTHERING THE STATE'S PERMISSIBLE OBJECTIVES.

Life is a constitutionally protected fundamental right, the infringement upon this right should trigger strict scrutiny under the compelling state interest and least restrictive means test. Before the State may take a person's life, it must show that such action is the least restrictive means towards furtherance of a compelling governmental goal.

The State certainly does have a legitimate interest in suppressing and eliminating robbery-murders, along with many other offenses ranging from murder for hire to public drunkenness. The issue is not whether the State has an interest, it would appear that the State has a duty to achieve this goal. The actual issue is whether the death penalty is a necessary means toward that end or whether a less restrictive measure would suffice.

The most frequently used justification for capital punishment is that it deters potential felons from committing certain acts. To be a deterrent, the person committing a capital felony would have to stop and contemplate the possibility that he or she might die for their transgression. By its very nature, murder is a product of some type of mental deviation which would not be prevented by rational considerations. However, "the question to be considered is not simply whether capital punishment is a deterrent, but whether it is a better deterrent than life imprisonment." Furman v. Georgia, 408 U.S. 238, 346-347.

There is little evidence that the death penalty is a more effective deterrent than lesser punishment. (i.e., Sellin, CAPITAL PUNISHMENT (1967) 135-186, 224-253.) In fact, criminologists have almost unanimously agreed that capital punishment is totally ineffective as a deterrent to murder or that there is no appreciable influence on the murder rate. CALVERY, CAPITAL PUNISHMENT IN THE TWENTIETH CENTURY 1928, 51-90 and BOWERS, EXECUTIONS IN AMERICA, 1974.

Rather than deterrence, this writer can see that the death penalty may have a reverse effect. Mr. Bowers, ID. at 194, refers to a work entitled, "A Psychiatrist Looks at the Death Penalty," by L.J. West, in which the writer feels that the death penalty may contribute to murders or violent crimes by providing a mentally disturbed person with an attention getting device.

There also exists the fact that continual acceptance of the death penalty by the State and public officials would cause a breakdown in respect for human life in general.

Also, the fact that continuing the use of the death penalty, on the basis that it is a deterrent to crime, even when research has shown this to be wrong, prevents our society from actually facing the problem of violent criminal behavior and diverts its attention from more constructive approaches to this problem.

The right to life is a fundamental constitutional right, and this right should not be subjected to a criminal sanction that cannot be supported by some compelling interest of the State and should not be subjected to the mere assertion, without clear and convincing documentary evidence that the death penalty operates as a deterrent or satisfies some other permissible objective of the State.

Citizens who are more oriented toward the business and economic aspects of this issue would argue that it would be cheaper for the State to execute certain persons than to have to support them at state institutions for the rest of their lives. We would warn against any decision made on this basis. It would logically follow that we could do the same with mentally retarded, insane, physically handicapped, dependent children, or older retired citizens who rely on the State for support.

One justifiable objective of the State would be to make sure that the person would not commit a similar act in the future. Death is not the least restrictive means of carrying out this objective. The State may argue that the death penalty is less severe than condemning the offender to life imprisonment without parole. If that be the case, then life imprisonment becomes a more severe, yet less restrictive means of punishment and may have a greater retributive and deterrent effect.

CONCLUSION

Petitioner prays that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Patrick Dale O'Rourke, hereby certify that the foregoing has been served on the Honorable Jim Guy Tucker, Attorney General, Justice Building, Little Rock, AR 72201; and the Honorable Lee Munson, Prosecuting Attorney, Pulaski County Courthouse, Little Rock, AR, by placing same in the United States Mail, postage pre-paid on this 7 day of Dec., 1976.

Patrick Dale O'Rourke